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IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-766**

YODER BROTHERS, INC.,

*Petitioner,*

*v.*

CALIFORNIA-FLORIDA PLANT CORPORATION and CALIFORNIA-FLORIDA PLANT CORPORATION OF FLORIDA,

*Respondents.*

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Yoder Brothers, Inc., submits this Reply to Respondent's Brief in Opposition to Yoder's petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on September 7, 1976.

### Respondents Misstate the Issues Presented by the Decision Below.

Respondents' Brief in Opposition attempts to reformulate the issues presented by the Fifth Circuit's decision (1) by avoiding the question whether, as a matter of law, antitrust injury is to be measured by the amount of an overcharge by the claimant to its customers; and (2) by misstating stipulated facts.

This is not a case where Cal-Florida "seeks to recover illegal overcharge payment on direct purchases." (Brief in Opposition at 10.) The Fifth Circuit considered the source of Cal-Florida's injury (if any) and stretched *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), to a fact situation unlike the one involved in that case. Whereas *Hanover Shoe* stated that injury-in-fact could be found in situations in which a claimant was charged on its purchases an illegally high price, 392 U.S. at 489, the Fifth Circuit specifically held that this was not such a case:

> "We have been careful to describe the overcharge as one affecting Cal-Florida's sales price to *its* customers, rather than as a cost in Cal-Florida's business in the same sense as fertilizer was a cost."

537 F.2d at 1375 n.28 (85a). The distinction between an overcharge *to* the claimant and *by* the claimant is fundamental, yet Cal-Florida continues to becloud the issue by calling for direct extension of *Hanover Shoe* to an inappriate situation.

Respondents' restatement of the Questions Presented does not square with the opinion below or with their own evidentiary admissions. Respondents state:

> "The initial question is whether the respondents, who directly paid substantial sums of money to petitioner Yoder as a result of the coercion of Yoder's illegal boycott, are precluded as a matter of law from *recovering these sums* by the 'passing-on' defense."

(Brief in Opposition at 1-2) (emphasis added). Respondents then attempt to convey the impresion that Cal-Florida suffered an out-of-pocket loss in the total amount of



royalties collected by reason of the collection and remittance of such royalties. (Brief in Opposition at 16-17.) It is a stipulated fact, however, that Cal-Florida paid no royalties that were not collected from its customers.* (Pretrial Stipulation ¶ 5(m), 133a; 537 F.2d at 1372, 76a.) Cal-Florida's lack of out-of-pocket loss is attributed to the structuring of BGA "royalty" collections. Cal-Florida remitted a royalty upon the *sale* of a royalty bearing cutting. The sale of the cutting to Cal-Florida's customers imposed an obligation on the customer to pay the royalty to Cal-Florida for remittance to BGA. The sale was made pursuant to invoices and price announcements that specifically highlighted the fact that the royalty was not part of the cutting price but was separate and additional to such price and was collected to be returned to BGA. Further, if Cal-Florida was unable to collect the royalty from its customer, it was entitled to a credit in the amount of the deficiency. Cal-Florida's recollection of those royalties would be an unjust windfall unsupported by any established theory of antitrust enforcement.

In deciding whether to grant certiorari in this case, this Court should not be misled by Cal-Florida's newly-introduced statistical "analyses". Like the "price differential" damage theory rejected by the Fifth Circuit, 537 F.2d at 1369-72 (63a-75a), Cal-Florida's "Margin of Profit" calculations (Brief in Opposition at 15) have no economic meaning. The tabulated years pre-date the stat-

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* Cal-Florida's citation to the testimony of "two commercial propagators, in addition to Cal-Florida, . . . that they were unable to pass on BGA royalties," (Brief in Opposition at 17), is equally misleading. Had Cal-Florida provided this Court with a Supplemental Appendix that included such references to the record below, it would be apparent that the cited testimony referred, in one instance, to *patent* royalties, which are collected on a different basis than were BGA and GRA royalties, and in the other instance, not to BGA royalties, but to the incidental expenses of handling additional BGA varieties.

ute of limitations period considered by the District Court. What Cal-Florida calls the profit "margin" on each cutting is a meaningless averaging of total profits over unstated unit numbers of different products and says nothing about how Cal-Florida's total profits and operating profit margins were affected. Moreover, claims of "reorganization" bringing increased profits have no relation to any damages caused by BGA and GRA royalties, either according to logic or to the evidence (which Cal-Florida fails to show the Court).

Raising the possibility that higher prices affected total sales because of some growers turning to self-propagation (Brief in Opposition at 17) is illogical. The Fifth Circuit noted that this "threat" was improbable. 537 F.2d at 1370 n.23 (68a). Self-propagation was no "threat" logically, either, since self-propagators were required to pay the same royalty as were growers. 537 F.2d at 1353-54 (12a). Cal-Florida's testimony, exemplified by that of Neckar, described in Yoder's Petition pp. 6-7, establishes beyond any question that the royalties collected and remitted by Cal-Florida did not cause Cal-Florida a loss of volume, price or profit and do not measure any damages Cal-Florida may have suffered.



## Conclusion

WHEREFORE, Yoder prays that this Court consider the issue presented by the Fifth Circuit decision and grant a writ of certiorari to determine whether as a matter of law Cal-Florida suffered injury-in-fact by reason of overcharges to *its* customers and whether Cal-Florida's injury may be measured by the amount of those overcharges.

Respectfully submitted,

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